

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
OFFICE OF CONSERVATION AND COASTAL LANDS
Honolulu, Hawaii

REF:OCCL:DH

FEB 10 2006

CDUA KA-3259

Acceptance Date: September 16, 2005
180-Day Exp. Date: March 15, 2006

**Board of Land and
Natural Resources
State of Hawaii
Honolulu, Hawaii**

REGARDING: After The Fact (ATF) Conservation District Use Application (CDUA) KA-3259 for Proposed Landscaping and Gate Installation

APPLICANT: Walton D. Hong, 3135-A Akahi Street, Lihue, Kauai, 96766

LANDOWNER: Nellie and Cookie Trust, 8383 Wilshire Boulevard, Suite 500, Beverly Hills, California, 90211

LOCATION: Haena, Island of Kauai

TMK: (4) 5-9-002:025

**AREA OF PARCEL/
USE:** 0.569 Acres (24,787 square feet)
Same

SUBZONE: Limited

ENFORCEMENT CASE KA-04-33:

On Friday, May 13, 2005, the Board of Land and Natural Resources (Board) found the Nellie and Cookie Trust (Trust) to be in violation of Title 13-5 Hawaii Administrative Rules, and Chapter 183C, Hawaii Revised Statutes (HRS), by failing to obtain the appropriate approval for landscaping 16,524 square feet of the subject parcel. The Trust was fined \$3,000.00, and told to apply for an After The Fact (ATF) CDUA for the landscaping action. The Trust has applied for the ATF CDUA for landscaping, and installation of a gate.

DESCRIPTION OF AREA/CURRENT USE:

The proposed project encompasses 24,787 square feet of subject parcel TMK: (4) 5-9-002:025, located in Haena, Island of Kauai. The subject parcel is located in the State Land Use (SLU) Conservation District, Limited subzone. Private and public landowners bound the subject parcel to the south, east, west, and north. Access to the subject parcel is by access roads (B-1, B-2 and B-4), which joins to Kuhio Highway (**Exhibits 1, 2 & 3**).

PROPOSED PROJECT:

The Trust is proposing to resolve Enforcement Case KA: 04-33, and receive approval for the future landscaping action, and gate installation, pursuant to Section 13-5-23, Hawaii Administrative Rules (HAR), L-4, LANDSCAPING AND REMOVAL OF NOXIOUS PLANTS, D-1, "Removal of noxious plants for maintenance purposes in an area of more than ten thousand square feet that results in significant ground disturbance (e.g. clearing or grubbing)."

Existing flora before the landscaping consisted of java plums, ironwoods, and grasses. The current flora as a result of the unauthorized landscaping includes False Kamani, African Tulip, Areca Palm, Hala, Bamboo, Clumping Fishtail Palm, Saw Palmetto, Bird of Paradise, Plumeria, Montgomery Palm, Royal Palm, Cabadae Palm, Foxtail Palm, Madagascar Palm, Manila Palm, Bottle Palm, Spindle Palm, Traveler's Palm, Dwarf Date Palm, Citrus, and Croton; and totals an approximate area of 16,524 square feet (**Exhibit 4**).

The proposed landscaping includes Madagascar Olive, False Kamani, True Kamani, Kou, Milo, and Hala; and totals an approximate area of 8,262 square feet. A gate is proposed to provide security to the landowner and by limiting access (**Exhibit 5**).

No rare or endangered flora and/or fauna were encountered, or documented on the project area. No known traditional and customary native Hawaii rights are exercised at the project site. Previous work on the site uncovered remains however the Kauai Branch of the Historic Preservation Division (HPD) was contacted.

AGENCY COMMENTS:

The CDUA was referred for review and comment to the DLNR – Kauai Branch Historic Preservation Division, Kauai District Land Office, Kauai County Planning Department, Office of Hawaiian Affairs, Office of Environmental Quality Control, and Princeville Public Library. The following comments were received:

Kauai District Land Office
No Comment.

Historic Preservation Division

HPD responded for TMK: (4) 4-1-003:039, and believes there are significant historic sites (habitation, human burials, temporary habitation) that exist in the area. The applicant should: 1) hire a cultural resource management (CRM) consultant; 2) prior to work an approved archeological monitoring plan should be submitted and followed; 3) a qualified archeologist should monitor on-site activities during the surface and subsurface work.

Staff notes the HPD responded, but noted a different TMK than subject parcel (4) 5-9-002:025. The applicant has responded accordingly.

Applicant Comment: On the basis that that HPD reference was in error but addresses the proposed landscaping and gate project, we contacted the HPD Kauai Branch archeologist. The applicant will hire a qualified archeologist for the monitoring plan and findings, which will satisfy the requirement for a cultural resource management consultant.

Office of Hawaiian Affairs

OHA appreciates HPD recommendation that an archeological monitor will be on site during all ground-disturbing activities, as human remains have been found on the subject parcel. Should iwi kupuna or Native Hawaiian cultural or traditional deposits can be found during ground disturbance or excavation, work will cease, and the appropriate agencies will be contacted pursuant to applicable law. OHA notes that human remains were found on the subject parcel, however the applicant notes they are not aware of any valued cultural, historical or natural resources. OHA notes all human remains are "valued" by Native Hawaiians. Lastly, native plants should be used because: 1) the area will be able to absorb more water as locally and naturally as possible; 2) alien species will not introduced; and 3) environmental protection is more appropriate for the Conservation District.

Applicant Comment: We accept the condition made by the HPD that an approved archeological monitoring plan be submitted, approved, and followed. A qualified archeologist will be hired and will monitor on-site activities during the subsurface and subsurface work. Should cultural or historical resources, or skeletal remains be uncovered work will stop, and the Kauai Branch HPD, and Kauai Burial Council will be notified. We apologize - we did not intend to imply that human remains are not valued cultural, historical or natural resources as the reference was meant to apply to non-skeletal remains. Lastly, due consideration will be given towards using native plants for the remaining landscape work.

ANALYSIS:

Following review and acceptance for processing, the applicant was notified, by letter dated September 20, 2005 that:

1. The proposed use is an identified land use in the Conservation District, according to Section 13-5-23, Hawaii Administrative Rules (HAR), L-4, LANDSCAPING AND REMOVAL OF NOXIOUS PLANTS, D-1; "Removal of noxious plants for maintenance purposes in an area of more than ten thousand square feet that results in significant ground disturbance (e.g. clearing or grubbing);" please be advised, however, that this finding does not constitute approval of the proposal;

2. Pursuant to Section 13-5-40, HAR, a public hearing will not be required; and
3. In conformance with Chapter 343, Hawaii Revised Statutes (HRS), as amended, and HAR, Title 11, Department of Health, Chapter 200, Environmental Impact Statement Rules, Subchapter 8, Section 11-200-8(4), an exemption for the proposed action was listed. An Environmental Impact Statement is not required, and an Environmental Determination was that of No Significant Impact.

13-5-30 CRITERIA:

The following discussion evaluates the merits of the proposed land use by applying the criteria established in Section 13-5-30 HAR.

- 1) *The proposed use is consistent with the purpose of the Conservation District.*

The objective of the Conservation District is to conserve, protect and preserve the important natural resources of the State through appropriate management and use to promote their long-term sustainability and the public health, safety and welfare.

Staff is of the opinion that the proposed action will conserve, protect, and preserve the natural resources, as the action is passive and low impact. The applicant will landscape the area with species of Madagascar Olive, False Kamani, True Kamani, Kou, Milo, and Hala; preference will be given towards using native plants for the remaining landscape work.

- 2) *The proposed land use is consistent with the objectives of the Subzone of the land on which the use will occur.*

The objective of the Limited subzone is to limit uses where natural conditions suggest constraints on human activities.

Staff notes the proposed activities do not encourage additional human activities on the property, and open space resources would be preserved. Landscaping is an identified land use within the Limited subzone.

- 3) *The proposed land use complies with the provisions and guidelines contained in Chapter 205A, HRS entitled "Coastal Zone Management", where applicable.*

The project is located within the County's Special Management Area (SMA); a SMA Minor permit was approved by the Planning Director on September 9, 2005. It also complies with the provisions identified in Chapter 205A, HRS in the following areas: Managing Development, and Scenic and Open Space Resources.

- 4) *The proposed land use will not cause substantial adverse impact to existing natural resources within the surrounding area, community or region.*

Staff notes that the proposed project will not have any adverse impact to existing natural resources within the surrounding area, community or region, provided that adequate mitigation measures are implemented. The site is landscaped, and further landscaping and gate installation will occur. However, the proposed project will not detract from the rural character of the area.

- 5) *The proposed land use, including buildings, structures and facilities, shall be compatible with the locality and surrounding areas, appropriate to the physical conditions and capabilities of the specific parcel or parcels.*

Staff is of the opinion the proposed project will fit into the locality and surrounding areas, with the use of Best Management Practices and without significant or deleterious effects to the locality, surrounding area and parcel.

- 6) *The existing physical and environmental aspects of the land, such as natural beauty and open space characteristics, will be preserved or improved upon, whichever is applicable.*

Staff will ensure Best Management Practices will be used to mitigate any potential impacts. The proposed project will maximize and enhance the natural beauty and open space characteristics of the subject parcel. The proposed project is intended to blend in visually with the surrounding area, and open space will be preserved.

- 7) *Subdivision of land will not be utilized to increase the intensity of land uses in the Conservation District.*

The proposed project does not involve subdivision of Conservation District land.

- 8) *The proposed land use will not be materially detrimental to the public health, safety and welfare.*

The proposed action will not be materially detrimental to the public health, safety and welfare. Staff concurs with the applicant.

DISCUSSION:

The proposed use is an identified land use within the Conservation District, according to Section 13-5-23, Hawaii Administrative Rules (HAR), L-4, LANDSCAPING AND REMOVAL OF NOXIOUS PLANTS.

Staff notes the applicant proposes to receive ATF CDUA approval for the 16,524 square foot area that was landscaped without approval, and receive the Board's approval to landscape an area of 8,262 square foot area, and install a gate for security. The applicant will landscape the area with species of Madagascar Olive, False Kamani, True Kamani, Kou, Milo, and Hala;

preference will be given towards using native plants for the remaining landscape work. The proposed project will maximize and enhance the natural beauty and open space characteristics of the subject parcel, as the use is passive. Staff does however recommend that Best Management Practices be used to mitigate any potential impacts when conducting the proposed project.

Staff comments that there is significant potential for fugitive dust to be generated during the landscaping action, and may impact nearby residents. It is recommended that a dust control management plan be developed which identifies and addresses those activities that have a potential to generate fugitive dust. In addition, construction activities must comply with provisions of HAR, Section 11-60.1-33 on Fugitive Dust.

Staff notes the contractor should provide adequate means to control dust from road areas and during the various phases of construction activities, including by not limited to: 1) planning the different phases of construction, focusing on minimizing the amount of dust-generating materials and activities, centralizing material transfer points and on-site vehicular traffic routes, and locating potentially dusty equipment in areas of the least impact; 2) providing an adequate water source at the site prior to start-up of construction activities; 3) landscaping and rapid covering of bare areas, including slopes, starting from the initial grading phase; 4) controlling of dust from shoulders, project entrances, and access roads; 5) and providing adequate dust control measures during weekends, after hours, and prior to daily start-up of construction activities.

Therefore, staff recommends the following:

RECOMMENDATION:

That the Board of Land and Natural Resources APPROVE CDUA KA-3259 for the Nellie and Cookie Trust request for approval for the prior landscaping action, the proposed landscaping action, and gate installation, Haena District, Island of Kauai, subject to the following terms and conditions:

1. The applicant shall comply with all applicable statutes, ordinances, rules, and regulations of the federal, State and county governments, and the applicable parts of Section 13-5-42, HAR;
2. The applicant, its successors and assigns, shall indemnify and hold the State of Hawaii harmless from and against any loss, liability, claim or demand for property damage, personal injury or death arising out of any act or omission of the applicant, its successors, assigns, officers, employees, contractors and agents under this permit or relating to or connected with the granting of this permit;
3. The applicant shall comply with all applicable Department of Health administrative rules. Particular attention should be paid to Hawaii Administrative Rules (HAR), Section 11-60.1-33, "Fugitive Dust" and to Chapter 11-46, "Community Noise Control," and Chapter 11-54 National Pollutant Discharge Elimination System;

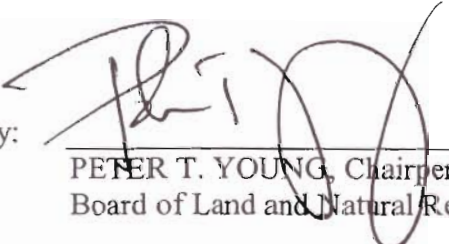
4. Before proceeding with any work authorized by the Board, the applicant shall submit four copies of the construction plans and specifications to the Chairperson or his authorized representative for approval for consistency with the conditions of the permit and the declarations set forth in the permit application. Three copies will be returned to the applicant. Plan approval by the Chairperson does not constitute approval required from other agencies;
5. Any work or construction to be done on the land shall be initiated within one year of the approval of such use, in accordance with construction plans that have been approved by the Department; further, all work and construction must be completed within three years of the approval;
6. The applicant shall notify the Office of Conservation and Coastal Lands in writing prior to the initiation, and upon completion, of the project;
7. Where any interference, nuisance, or harm may be caused, or hazard established by the use, the applicant shall be required to take measures to minimize or eliminate the interference, nuisance, harm, or hazard;
8. The applicant will use Best Management Practices for the proposed project;
9. The applicant will give preference towards using native plants for the remaining landscape work;
10. The applicant understands and agrees that this permit does not convey any vested rights or exclusive privilege;
11. In issuing this permit, the Department and Board have relied on the information and data that the applicant has provided in connection with this permit application. If, subsequent to the issuance of this permit, such information and data prove to be false, incomplete or inaccurate, this permit may be modified, suspended or revoked, in whole or in part, and/or the Department may, in addition, institute appropriate legal proceedings;
12. In the event that unrecorded historic remains (i.e., artifacts, or human skeletal remains) are inadvertently uncovered during construction or operations, all work shall cease in the vicinity and the applicant shall immediately contact the State Historic Preservation Division;
13. The applicant shall provide documentation (i.e. book/page document number) that this approval has been placed in recordable form as a part of the deed instrument, prior to submission for approval of subsequent construction plans;
14. Other terms and conditions as may be prescribed by the Chairperson; and

15. That failure to comply with any of these conditions may render this Conservation District Use Permit null and void.

Respectfully Submitted,



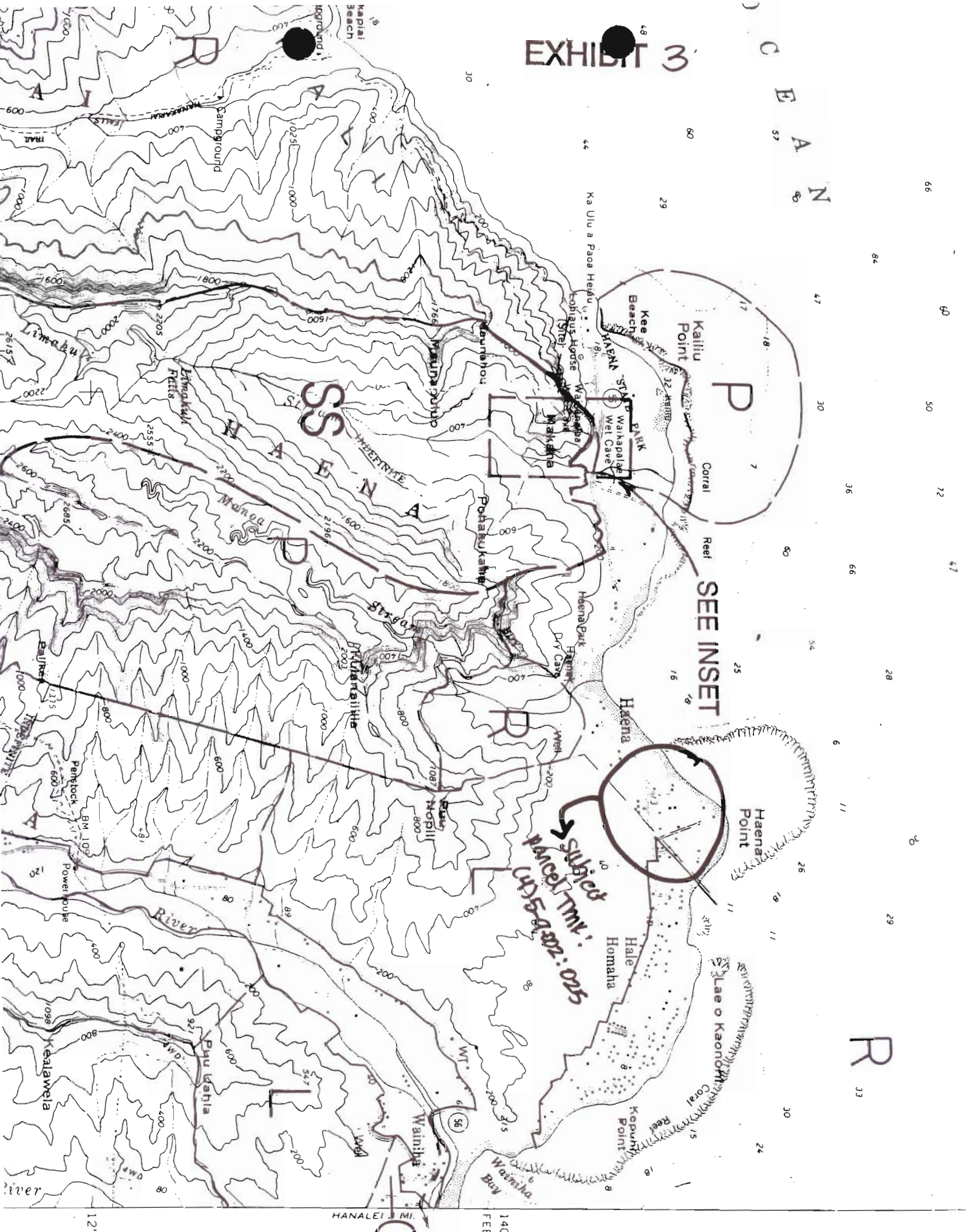
Dawn T. Hegger
Staff Planner

By: 
PETER T. YOUNG, Chairperson
Board of Land and Natural Resources

[illegible]

Subject Parcel TMK: (A) 5-9-002: 025

EXHIBIT 3



R 33



- PLUMERIA** **MONTGOMERY PALM** **FALSE KAMANI** **AFRICAN TULIP** **IRONWOOD** **ARECA PALM** **HALA** **BAMBOO-LUMPY NOODLE** **CLIPPING FISHTAIL PALM** **SAW PALMETTO** **GIANT BIRD OF PARADISE** **BIRD OF PARADISE**
- ROYAL PALM** **CADADAE PALM** **FOXTAIL PALM** **MADAGASCAR PALM** **MANILA PALM** **BOTTLE PALM** **SPINDLE PALM** **TRAVELER'S PALM** **DWARF DATE PALM** **CITRUS** **CROTON**

PLANT LEGEND
Scale: 1 inch = 10 feet

Existing landscape and native vegetation

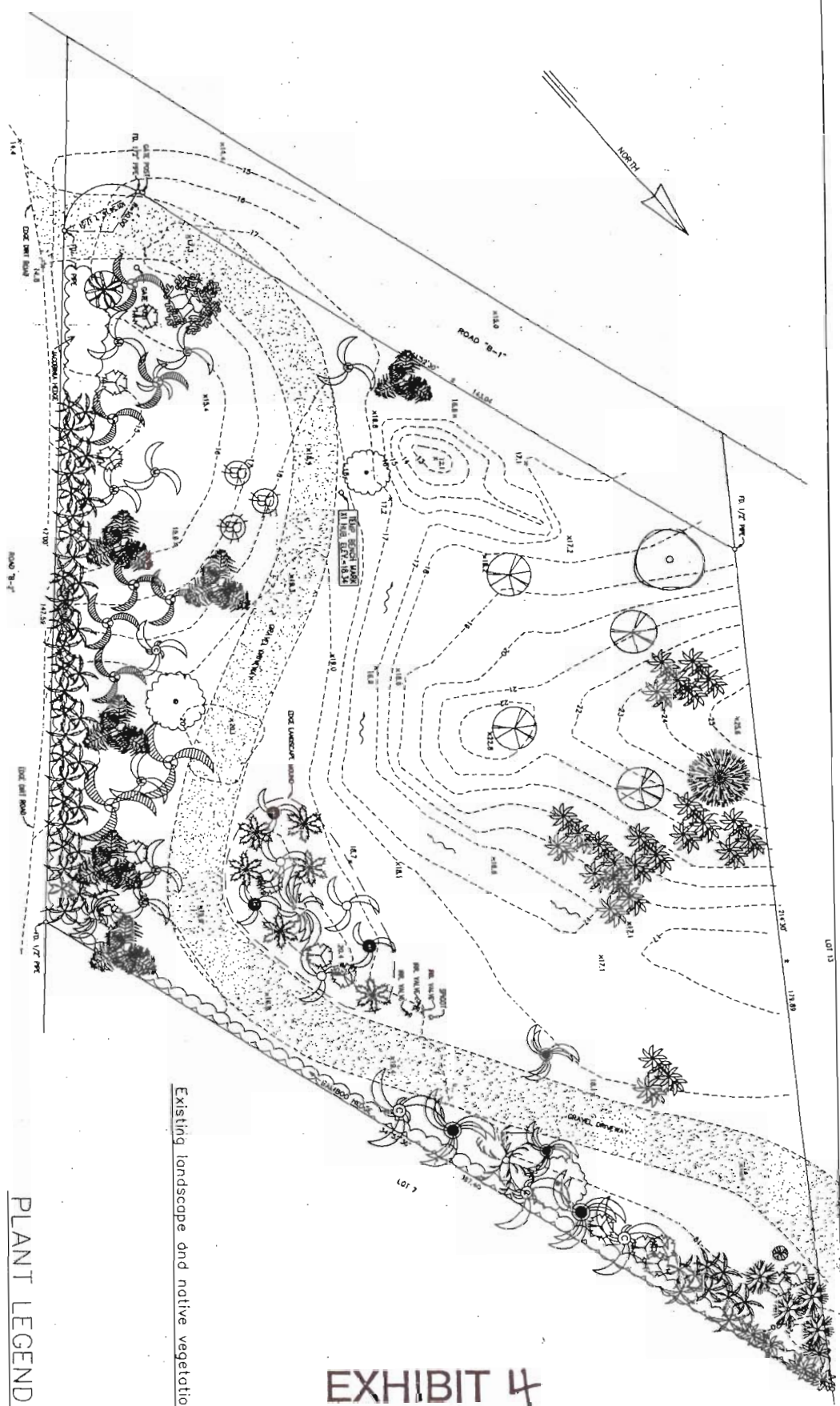
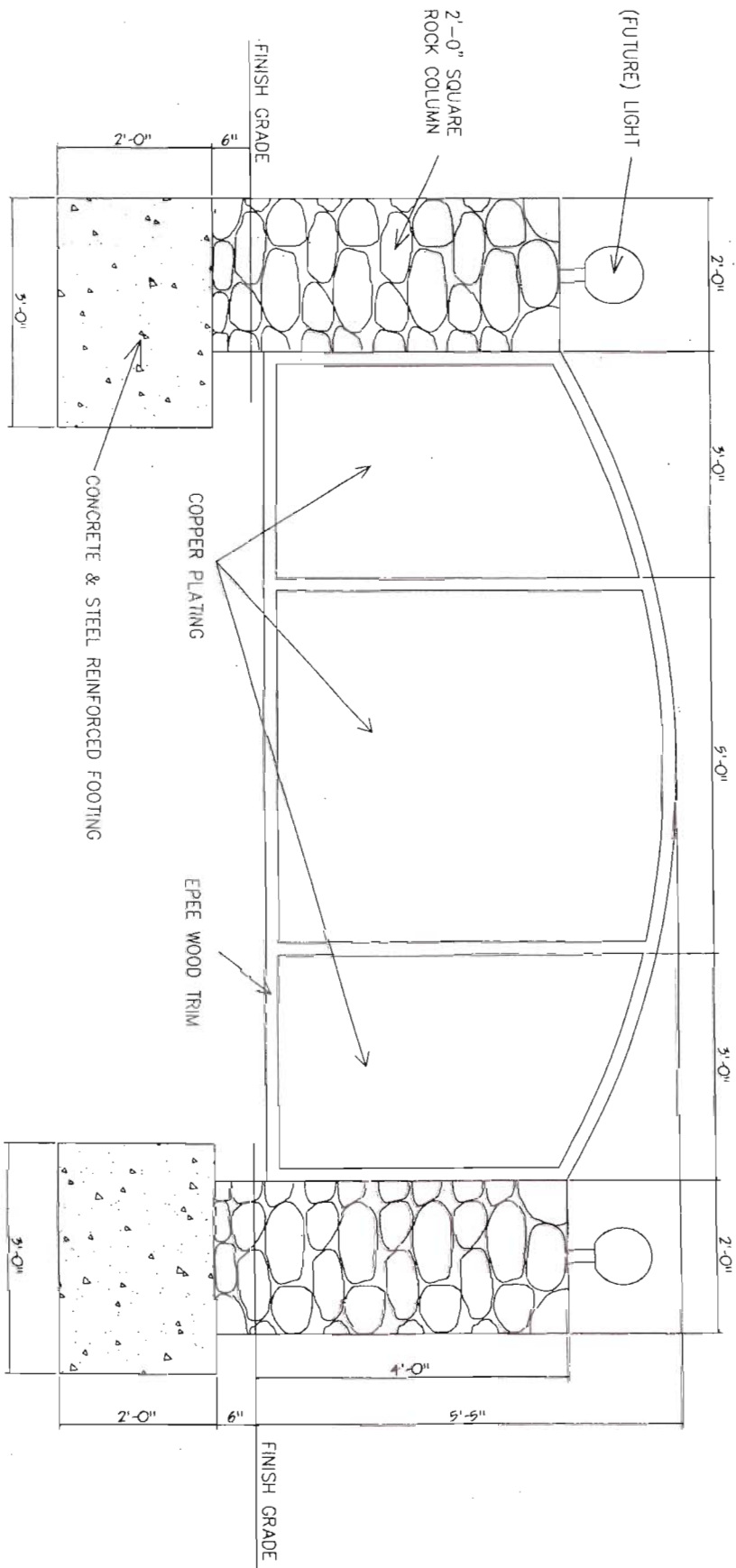


EXHIBIT 4



D
3

STAINLESS STEEL GATE WITH COPPER AND EPEE WOOD TRIM

SCALE : 1" = 1'-0"

EXHIBIT 4

